

**IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA,)	
)	
Plaintiff,)	
)	
v.)	No. 05-CV-329-GKF(PJC)
)	
TYSON FOODS, INC., et al.,)	
)	
Defendants.)	

**STATE OF OKLAHOMA’S MOTION IN LIMINE PERTAINING TO
AS YET UNARTICULATED FUTURE WATER QUALITY CRITERIA**

COMES NOW the Plaintiff, the State of Oklahoma, ex rel. W.A. Edmondson, in his capacity as Attorney General of the State of Oklahoma, and Oklahoma Secretary of the Environment, J.D. Strong, in his capacity as the Trustee for Natural Resources for the State of Oklahoma under CERCLA (“State”), and respectfully moves this Court to enter an Order precluding Defendants from making any argument, doing any questioning or proffering any evidence regarding as yet unarticulated future revised Ambient Water Quality Criteria. In support of this Motion, the State shows the Court as follows:

I. Introduction and Background

The State of Oklahoma has adopted water quality standards that establish classifications of uses of waters of the state, criteria to maintain and protect such classifications, and other standards or policies pertaining to the quality of such waters. 82 Okla. Stat. § 1085.30(A). These water quality standards are promulgated as rules by the Oklahoma Water Resources Board pursuant to Title 82, Section 1085.30 of the Oklahoma Statutes and have the force and effect of laws of the State of Oklahoma. *Estes v. ConocoPhillips Co.*, 184 P.2d 518, 523 (Okla. 2008) (“Administrative rules are valid

expressions of lawmaking powers having the force and effect of law.”). The standards are to be enforced by state agencies in protecting the waters of the State from pollution. *See* 82 Okla. Stat. 1085.30(C)(1). The State has established water quality standards designed to protect human health from unsafe levels of bacteria in waters that are used for primary body contact recreation. *See* OAC 785:45-5-16. Included within these standards are numeric criteria for bacteria concentrations for fecal coliform, *E. coli*, and enterococci which are “indicator bacteria.” *See* OAC 785:45-5-16(c). In this case, the State is seeking to enforce the primary body contact recreation standards against Defendants whose poultry waste disposal practices are contributing to the widespread exceedence of these standards in the IRW and are thus in violation of state pollution laws which are designed to protect human health.

Bacteria water quality standards based on “indicator bacteria” concentrations have been accepted since the publication of EPA’s Ambient Water Quality Criteria (“AWQC”) in 1986. *See, e.g.*, Dkt. #2028-4 (Harwood Report, ¶26). Indeed, Defendants’ own expert, Dr. Herman Gibb, has testified that these same standards advanced by EPA in 1986 are “what we’re using today” as the accepted method for assessing aquatic microbial human health risks. Dkt. #2156-6 (Gibb 4/09/09 Depo. at 54).

Nonetheless, Defendants have criticized the State’s reliance on indicator bacteria water quality standards in order to characterize and evaluate aquatic microbial health risks within the Illinois River Watershed (“IRW”). *See, e.g.*, Dkt. #2067 (Motion to Exclude Teaf at 7-9); Ex. A (Gibb Report, ¶¶ 14-27).

While Dr. Gibb expressed dissatisfaction with the indicator bacteria standards, when asked what standard he would recommend for assessing aquatic human health risks in the IRW, he responded honestly:

I'm not in a position to recommend a standard. I mean, I think that's, you know, the -- going to be the result of the research that the agency is doing. I mean, I wouldn't advance a particular standard but -- but that's my answer.

Ex. B (Gibb Depo. at 54-55).

The "research that the agency is doing," as referenced by Dr. Gibb, is EPA's ongoing work in reviewing and revising the AWQC, originally published in 1986. *See* Ex. A (Gibb Report, ¶¶ 21; 25-7); Ex. B (Gibb Depo. at 120-21). These revised AWQC will be published -- if at all -- in the year 2012 or beyond. Still, Defendants are implying that the revised AWQC will dispense with use of indicator bacteria. *Id.* at ¶¶ 21, 25 and 27. This is pure speculation. No one truly knows what the revised AWQC will look like when finally published. And whether published in 2012 or later, the revised AWQC will not go into effect until well after this case has been tried.

More importantly, Oklahoma's current mandatory water quality standards are based on indicator bacteria and are state law. Because indicator bacteria are the current and accepted method for assessing aquatic microbial health risks under Oklahoma law (and under EPA's AWQC), Defendants' predictions about future, unarticulated water quality criteria is wholly irrelevant and should be precluded.

II. Legal Standard

"Evidence which is not relevant is not admissible." Fed. R. Evid. 402. "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less

probable than it would be without the evidence.” Fed. R. Evid. 401. “Though the standard for relevance under Federal Rule of Evidence 401 is quite generous, *see United States v. Jordan*, 485 F.3d 1214, 1218 (10thCir. 2007), proffered evidence must, at minimum, advance the inquiry of some consequential fact to be considered relevant and admissible. *See* 7 Kenneth S. Broun, *McCormick on Evidence* § 185 (6th ed. 2006)”; *United States v. Oldbear*, 568 F.3d 814, 820 (10thCir. 2009).

Moreover, “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Fed. R. Evid. 403. “Relevant evidence may be excluded if it fails the Rule 403 analysis.” *Wolfgang v. Mid-America Motorsports, Inc.*, 111 F.3d 1515, 1527 (10thCir. 1997).

III. Argument

A. Evidence and Argument Regarding Revised Ambient Water Quality Criteria Which May be Adopted by EPA in the Future is Speculative and Irrelevant

Again, numeric water quality standards for fecal indicator bacteria are the standards by which risk to human health from bacterial pollution are judged under Oklahoma law. *See* OAC 785:45-5-16(c). Simply put, if the bacteria standards are exceeded, the law determining the appropriate risk level is violated. And since 1986, EPA AWQC have been based on indicator bacteria. Thus, Defendants’ speculation about as yet unarticulated AWQC is truly irrelevant.

Courts are rightfully reluctant to speculate as to the future provisions of statutes, regulations or guidelines. Indeed, it is completely inappropriate and improper for courts

to engage in such speculation. *See, e.g., Cabrera v. City of Huntington Park*, 159 F.3d 374, 378 (9th Cir.1998) (“[T]his [c]ourt’s duty is to ascertain and apply the existing California law, not to predict that California may change its law and then to apply our notion of what that change might or ought to be.”); *In re Air Crash at Lexington, Kentucky, August 27, 2006*, 556 F.Supp.2d 665, 676 (E.D.Ky. 2008) (“[A] possibility that the law may change in the future is not sufficient for this Court to speculate as to yet unarticulated law.”); *United States v. Smart*, 98 F.3d 1379, 1394 (D.C.Cir. 1996) (refusing appellants’ invitation to speculate that circuits would change their position on mandatory nature of cocaine sentencing guidelines if Congress adopted certain recommendations of Sentencing Commission). This principle of law is long-standing. As the Supreme Court observed in *Wiscart v. D’Auchy*, 3 U.S. 321, 328 (1796), “...it is of more importance, for a judicial determination, to ascertain what the law is, than to speculate upon what it ought to be.”

Here, Defendants should not be permitted to inject their predictions and speculation about particular changes EPA may make in the future to the current Ambient Water Quality Criteria. What the provisions of any revised AWQC will -- or will not -- contain is unknown. Indeed, it is not even entirely certain that the AWQC will ever change. It is clear that Defendants would like the Court to believe that EPA is moving away from its reliance upon indicator bacteria as a risk assessment tool. Defendants’ speculation in this regard is irrelevant. Speculative evidence or argument as to what EPA may (or may not) do in the future does not “advance the inquiry of some consequential fact...” *Oldbear*, 568 F.3d at 820. This is especially true here because Oklahoma’s water quality standards are state law and the standards are based on indicator bacteria.

Therefore, evidence and argument regarding as yet unarticulated AWQC should be precluded.

B. Even if Relevant, any Probative Value of Evidence and Argument Regarding Revised Ambient Water Quality Criteria Which May be Adopted by EPA in the Future is Substantially Outweighed by the Danger of Unfair Prejudice and Confusion of the Issues

Even if the Court finds some probative value in evidence or argument concerning Defendants' predictions and speculation about as yet unarticulated revised AWQC, that probative value is substantially outweighed by the danger of unfair prejudice and confusion of the issues. Defendants should not be permitted to substitute their prediction about what the revised AWQC will be at some future date for the current binding standards under Oklahoma law in effect at this time. The prejudice to the State and potential for confusion from the admission of such speculative evidence and argument is axiomatic. Thus, such evidence and argument should be precluded under Rule 403.

WHEREFORE, premises considered, the State respectfully requests that the Court grant this Motion in Limine and enter an Order precluding Defendants from making any argument, doing any questioning or proffering any evidence regarding as yet unarticulated future revised Ambient Water Quality Criteria.

Respectfully submitted,

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